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No. 08-334

In The
SUPREME COURT OF THE UNITED STATES

CLAYTON ANTHONY WALKER, Individually and as Administrator of the Estate of Breanna Nicole Walker on behalf of Breanna Nicole Walker,
Petitioners,

v.

RUSS MUNSELL, Officer; DAVID HOOTER, Officer; RODNEY WALKER, Officer,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred when it found that the district court properly decided the motion for summary judgment filed by Defendants Russ Munsell, David Hooter and Rodney Walker, by dismissing Plaintiff's excessive force and malicious prosecution claims on the grounds that no genuine issues of material fact exist and Defendants are entitled to judgment as a matter of law. The specific issues are as follows:

   a. Whether the Fifth Circuit was correct in affirming the district court's application of *Heck v. Humphrey*[1] to Plaintiff's excessive force claim.

   b. Whether the Fifth Circuit was correct in affirming the district court's application of *Heck* to Plaintiff's particular excessive force claim wherein Plaintiff categorically denies resisting arrest in his 42 U.S.C. § 1983 action.

   c. Whether the Fifth Circuit was correct in finding that the plain language of *Heck* applied to Plaintiff even though he is habeas corpus ineligible since Plaintiff has

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[1] 512 U.S. 477 (1994).

other procedural means of establishing favorable termination under *Heck*.

2. Whether the Fifth Circuit erred when it found the district court did not abuse its discretion when it refused to certify its dismissal of Plaintiff's excessive force claim for immediate appeal under Federal Rule of Civil Procedure 54(b).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

CITATIONS TO OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI 8

ARGUMENT 11

I. Summary of Argument 11

A. The *Heck* Doctrine Was Not Waived 11

B. *Heck* Applies to Excessive Force Claims Where Plaintiff Categorically Denies Resistance 12

C. The Plain Language of *Heck* Applies to Plaintiff Even Though He Is Habeas Ineligible 13

D. The District Court Properly Exercised its Discretion in Denying Rule 54(b) Certification 13

II. The Fifth Circuit Properly Found Summary Judgment Was Warranted 14

A. *Heck v. Humphrey* Standard 14

B. The Fifth Circuit Properly Found the *Heck* Doctrine Was Not Waived 15

C. The Fifth Circuit Correctly Found *Heck* Bars This Particular Excessive Force Claim Wherein Plaintiff Categorically Denies Resisting Arrest in His § 1983 Action 17

1. *Arnold* and Its Progeny 18

2. Plaintiff's Claims are Like *Arnold* and Its Progeny 20

3. Plaintiff's Excessive Force Claim is Distinguishable From Claims That Survive *Heck's* Bar 22

D. The Fifth Circuit Properly Found the Plain Language of *Heck* Applies to Plaintiff Even Though He Is Habeas Ineligible Since Plaintiff Has Other Procedural Means of Establishing Favorable Termination. 24

III. The District Court Did Not Abuse Its Discretion When It Refused To Certify Its Dismissal of Plaintiff's Excessive Force Claim For Immediate Appeal Under Federal Rule Of Civil Procedure 54(b) 28

CONCLUSION 31

INDEX TO APPENDICES

APPENDIX D· Ruling on Motion for Rule 54(B) Certification of the United States District Court for the Middle District of Louisiana dated November13, 2007 ..... App. A

APPENDIX E· 42 U.S.C. § ..... App. B

APPENDIX F· U.S. Const. Amendments IV and XIV ..... App. C

TABLE OF CITED AUTHORITIES

CASES

Allied Chemical Corp. v. Mackay, 695 F.2d 854 (5th Cir. 1983) 11

Arnold v. Town of Slaughter, 100 Fed. Appx. 321 (5th Cir. 2004) 10, 12, 17, 18, 19, 20, 24

Baker v. City of Hollywood, No. 08-60294-CIV, 2008 WL 2474665 (S.D. Fla. June 17, 2008)..... 10, 25

Ballard v. Burton, 444 F.3d 391 (5th Cir. 2006) 6

Battle v. Marquardt, No. CV. A. 03-1062, 2006 WL 1073068 (W.D. Pa. Apr. 21, 2006) 10, 13, 25, 26

Bettes v. Stonewall Ins. Co., 480 F.2d 92 (5th Cir. 1973) 17

Beverly v. Talsma, No. 3:06-CV-0160-DFH-WGH, 2008 WL 2114886, (S.D. Ind. Mar. 28, 2008)..... 19

Boyd v. Biggers, 31 F.3d 279 (5th Cir. 1994)..... 29, 30

Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980)..... 29

DeLeon v. City of Corpus Christi, 488 F.3d 649 (5th Cir. 2007) 10, 12, 19, 30

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). 29

Dyer v. Lee, 488 F.3d 876 (11th Cir. 2007) 22

Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996) (*per curiam*) 12

Hassler v. Carson County, 111 Fed. Appx. 728 (5th Cir. 2004). 10, 26

Heck v. Humphrey, 512 U.S. 477 (1994) ..... *passim*

Jasmin v. Dumas, 726 F.2d 242 (5th Cir. 1984) 28

Johnson v. Dallas City Police Dept., 2004 WL 2964968 (N.D. Tex. Dec. 15, 2004), *aff'd*, 2005 WL 119467 (N.D. Tex. Jan. 18, 2005) 19

Johnson v. McElveen, 101 F.3d 423 (5th Cir. 1996) 29, 30

Jones v. Miles, 656 F.2d 103 (5th Cir. 1981) 16

Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) 11

Martinez v. City of Albuquerque, 184 F.3d 1123 (10th Cir. 1999) 23

Nelson v. Jashurek, 109 F.3d 142 (3d Cir. 1997) 23

Okoro v. Callaghan, 324 F.3d 488 (7th Cir. 2003) 17, 19

Phyfer v. San Gabriel Dev. Corp., 884 F.2d 235 (5th Cir. 1989) 16

Quintana v. Gates, No. CV 0007166 GAF, 2004 WL 1661540 (C.D. Cal. July 20, 2004) 16

Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000) 10, 13, 26

Road Sprinkler Fitters Local Union v. Continental Sprinkler Co., 967 F.2d 145 (5th Cir. 1992)...28, 29

Robinson v. Doe, 272 F.3d 921 (7th Cir. 2001) 23

Sappington v. Bartree, 195 F.3d 234 (5th Cir. 1999) 15

Spencer v. Kemna, 523 U.S. 1 (1998)....26

Stephenson v. Reno, 28 F.3d 26 (5th Cir. 1994) 29

United States v. Shanbaum, 10 F.3d 305 (5th Cir. 1994). 11, 12

VanGilder v. Baker, 435 F.3d 689 (7th Cir. 2006) 22

Vickers v. Donahue, 137 Fed. Appx. 285 (11th Cir. 2005) 10, 25

Wallace v. Kato, 127 S. Ct. 1091 (2007) 30

Watson v. New Orleans City, 275 F.3d 46, 2001 WL 1268716 (5th Cir. Oct. 16, 2001) 11, 16

Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 537 U.S. 801 (2002) 23

Withrow v. Williams, 507 U.S. 680, 721 (1993) (Scalia, J., concurring) 27, 28

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 1

U.S. Const. amend. V 3

U.S. Const. amend. VIII 3

U.S. Const. amend. XIV 1, 3

STATUTES

42 U.S.C. § 1983 ..... *passim*

La. R.S. 14:108 21

RULES

Fed. R. Civ. P. 8(c) 11, 15, 16

Fed. R. Civ. P. 12(b) 16

Fed. R. Civ. P. 54(b) ..... ii, 3, 7, 8, 13, 14, 28 29, 31

Sup. Ct. Rule 10 ..... 8, 9 10

Sup. Ct. Rule 15.2 2

Sup. Ct. Rule 24.2. 2

CODE

Code of Ordinances, City of Denham Springs (La.) § 66-293 (1987) 2, 20, 23, 24

La. Code Crim. Proc. Ann. art. 220 (2008) 24

OTHER AUTHORITIES

Charles Alan Wright & Arthur R. Miller, 5 *Federal Practice and Procedure* § 1278 at 491-94 (3d ed. 1990) 16

CITATIONS OF OFFICIAL/ UNOFFICIAL REPORTS

Walker v. Munsell, No. 06-867-JJB-SCR (M.D. La. Aug. 24, 2007).....7

Walker v. Munsell, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007).....6, 7, 24, 26

Walker v. Munsell, No. 06-867-JJB-SCR, 2007 WL 3377270, at * 1 (M.D. La. Nov. 13, 2007).....7

Walker v. Munsell, No. 08-30087, 281 Fed. Appx. 388, 389-390 (5th Cir. June 13, 2008) 8

CITATIONS TO OPINIONS BELOW

Ruling on Motion to Dismiss, *Walker v. Munsell,* No. 06-867-JJB-SCR (M.D. La. Aug. 24, 2007).

Ruling on the Motion for Summary Judgment, *Walker v. Munsell,* No. 06-867-JJB-SCR, 2007 WL 3377202 (M.D. La. Oct. 1, 2007).

Ruling on Motion for Rule 54(b) Certification, *Walker v. Munsell,* No. 06-867-JJB-SCR, 2007 WL 3377270 (M.D. La. Nov. 13, 2007).

The Opinion of the Fifth Circuit Court of Appeal, *Walker v. Munsell,* No. 08-30087, 281 Fed. Appx. 388 (5th Cir. June 13, 2008).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents disagree with Petitioner's statement regarding the laws involved in this matter.

Petitioner's claims for violation of his constitutional rights are brought pursuant to 42 U.S.C. § 1983. The malicious prosecution and excessive force claims dismissed on Respondents' motion for summary judgment were for alleged violations of the Fourth and Fourteenth Amendments to the United States Constitution. The

text of these constitutional provisions and statutes appear in the appendix. Supreme Court Rule 24.1(f).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, Respondents state that they perceive several misstatements of fact in the petition for writ of certiorari. For the sake of brevity and clarity, Respondents discharge their obligation to the Court to point out the misstatements by presenting their own statement of facts instead of Petitioner's presentation of the facts. Supreme Court Rule 24.2.

This action involves the undisputed validity of the favorable termination requirement of *Heck v. Humphrey,* 512 U.S. 477 (1994). On July 30, 2007, Plaintiff-Petitioner Clayton Anthony Walker was convicted of three (3) counts of resisting an officer under the Code of Ordinances, City of Denham Springs (La.) § 66-293 (1987) and one (1) count of failure to signal. The convictions arose out of Plaintiff's arrest by Defendants on November 3, 2006 while Defendants were uniformed and on duty with the City of Denham Springs Police Department.

Without previously obtaining favorable termination of his criminal convictions[2], Plaintiff

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[2] Plaintiff has appealed his convictions but has been unable to obtain favorable termination.

filed this § 1983 action alleging causes of action for violation of civil rights under 42 U.S.C. § 1983, including unreasonable search and seizure and excessive force; deprivation of his Fifth and/or Fourteenth Amendment right to be free from malicious prosecution; deprivation of his Eighth Amendment right to be free from cruel and unusual punishment; and failure to provide medical care.[3]

Despite the Plaintiff's conviction of resisting arrest in the criminal suit, in the current lawsuit, Plaintiff repeatedly asserts in complaint[4], affidavit[5],

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[3] Plaintiff's 8th Amendment claim for alleged deliberate indifference to plaintiff's medical needs was dismissed on summary judgment on July 24, 2007. Plaintiff did not contest this ruling on appeal. Additionally, plaintiff voluntarily dismissed his failure to provide medical care claim after the district court denied Rule 54(b) certification of its ruling on plaintiff's excessive force claim.

[4] See Complaint for Damages at 4, *Walker v. Munsell*, No. 06-867 (M.D. La. Nov. 13, 2006). Plaintiff alleges: "Mr. Walker was on the ground with his hand behind his back, when another officer arrived moved his arms and instructed Mr. Walker to stop resisting arrest. Mr. Walker responded that he was not so doing."

[5] See Affidavit of Walker attached to Memorandum in Support of Motion Memorandum in Support of Motion to Take Deposition from Officer Russ Munsell, Officer David Hooter, Officer Rodney Walker, Officer Gerald Parker, Officer John Albritton, *Walker v. Munsell*, No. 06-867 (M.D. La. Jan. 15 2007). Plaintiff attested under oath:

> Someone grabbed both of my arms over my elbows at the lower part of my biceps and pulled them away from

deposition[6] and trial testimony[7] that after one of the Defendants made the traffic stop on November 3,

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> my face and behind my back and then my arms were just thrown toward the front of my body. I was still face down. Someone said something very close to 'quit resisting arrest.' I said, 'I'm not resisting arrest' and I moved my left and right arms and hands back to the lower part of my back.

[6] Walker dep. 50:5-9; 536-16; 57:5-9; 57:19-22, Apr. 11, 2007. On deposition, Plaintiff testified:

> Q: Did you at any time resist when this officer tried to turn you over?
> A: No, ma'am.
> ***
> Q: Okay, you may be seated. So, you told us – you told us that someone said quit resisting arrest?
> A: Yes, ma'am.
> Q: And so what did you say at that point?
> A: I said I wasn't resisting. I placed my hands back behind my lower back.
> Q: Do you know why they told you to quit resisting arrest?
> A: No ma'am.
> ***
> Q: Do you remember running at all that night?
> A: No, ma'am.
> Q: You don't remember running at all?
> A: No, ma'am.
> ***
> Q: Do you recall running at all that evening?
> A: No ma'am.

[7] See Certified Transcript of Criminal Trial Proceedings at 95-97, *City of Denham Springs v. Walker*, No. 221366 (July 30, 2007). Plaintiff testified:

2006, he attacked Plaintiff for no reason but Plaintiff did not resist any of the Defendants or their attempts to apprehend him during his arrest.

Q: Okay. What happened once the car stops; did you get out of the car?

A: Yes, ma'am, I waited for a minute, opened my door and got out. I was – that's when Officer – now that I know the officer, it was Officer Munsell was approaching the car, asked me for my license and registration.

Q: Okay. So what did you do then?

A: Leaned back in the car to get it.

Q: What happened after that?

A: I was struck from behind.

Q: What do you recall after being struck from behind?

A: Basically I – I remember hitting the ground. After that everything went – just became a blur because it – I was in shock. I was – I really couldn't place what was happening.

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Q: Okay. Did you run?

A: No, ma'am, I don't believe I did.

Q: The officer says as soon as he stopped, you got out of the car and started running.

A: No, ma'am, I don't recall myself running.

Q: Okay. What – at what point do you recall what was going on; I mean, are you kicked, punched, or anything happen [sic] like that?

A: I remember being kicked in the side of the head and the right side of my hip, my face. Basically all over. It was just – I just felt like I was just getting beat on. Like I said, I started to hyperventilate, I blacked out after being sprayed. I wasn't able to see anything. My breathing was very hard.

Pursuant to *Heck*, a plaintiff convicted of a crime cannot recover damages for violation of his constitutional rights if that "violation arose from the same facts attendant to the charge for which he was convicted, unless he proves 'that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.' " *Ballard v. Burton*, 444 F.3d 391, 396 (5th Cir. 2006) (quoting *Heck*, 512 U.S. 477 at 486-487).

Plaintiff has no evidence that his convictions have been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. See, *Heck*, 512 U.S. 477 at 486 - 487.

On October 1, 2007, the district court for the Middle District of Louisiana granted summary judgment in Defendants' favor dismissing Plaintiff's claims for excessive force and malicious prosecution "under the plain language of *Heck*."[8] *Heck* applied to Plaintiff even though he is habeas ineligible because "there is nothing precluding a direct appeal

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[8] *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 3 (M.D. La. Oct. 1, 2007); App. C Pet. Cert. 15a-15b.

of state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck*."[9]

Plaintiff sought immediate appeal of the portion of the district court's ruling that dismissed with prejudice Plaintiff's claim for excessive force.[10] However on November 13, 2007, the district court denied Federal Rule of Civil Procedure 54(b) certification finding the Plaintiff failed to demonstrate that certification under Rule 54(b) was appropriate.[11]

The Fifth Circuit Court of Appeal properly affirmed the district court's dismissal of Plaintiff's excessive force and malicious prosecution claims which squarely challenged Plaintiff's underlying convictions pursuant to *Heck* and its progeny, by: (1) affirming the finding that the *Heck* bar to suit is not waived by failure to plead it as an affirmative defense; (2) affirming *Heck's* application to Plaintiff's excessive force claim where Plaintiff claims he did nothing wrong; (3) affirming *Heck's* application to

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[9] *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007) ; App. C Pet. Cert. 22a.

[10] Ruling on Motion to Dismiss, *Walker v. Munsell*, No. 06-867-JJB-SCR (M.D. La. Aug. 24, 2007); App. D Pet. Cert. 24a-27a.

[11] *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377270, at * 1 (M.D. La. Nov. 13, 2007); App. A Opp'n. Pet. Cert. App. 1-2.

non-custodial plaintiffs; (4) affirming the district court's ruling denying Rule 54(b) certification on Plaintiff's excessive force claim.[12] Plaintiff now petitions this Court for writ of certiorari raising the same issues he raised in his appeal to the Fifth Circuit.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

Plaintiff presents no compelling reasons to review this case on a writ of certiorari. Sup. Ct. Rule 10. A petition for a writ must demonstrate that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

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[12] *Walker v. Munsell*, No. 08-30087, 281 Fed. Appx. 388, 389-390 (5th Cir. June 13, 2008).

> court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. Rule 10. No Rule 10 criterion is satisfied here.

While there may be a split in the circuits over the application of *Heck*'s favorable termination requirement to a habeas ineligible plaintiff, resolution of that issue is unnecessary in this case because this Plaintiff has other procedural means of establishing favorable termination. The core holding of *Heck* provides several means for a plaintiff to demonstrate invalidity of his sentence or conviction besides the issuance of a writ of habeas corpus. Favorable termination may be satisfied by showing the conviction or sentence has been: (1) reversed on direct appeal; (2) expunged by executive order; (3) declared invalid by a state tribunal authorized to make such determination; (4) or called into question by a federal court's issuance of a writ of habeas corpus. *Heck,* 512 U.S. 477, 486-477. Since Plaintiff is able to directly appeal his conviction, this Court does not have to decide whether *Heck's* favorable termination requirement should be relaxed for a plaintiff who has no procedural vehicle to challenge

his conviction. *See Vickers v. Donahue*, 137 Fed. Appx. 285 (11th Cir. 2005); *Baker v. City of Hollywood,* No. 08-60294-CIV, 2008 WL 2474665 (S.D. Fla. June 17, 2008); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Battle v. Marquardt,* No. CV. A. 03-1062, 2006 WL 1073068, at *2 (W.D. Pa. Apr. 21, 2006); *Hassler v. Carson County*, 111 Fed. Appx. 728 , at * 1 (5th Cir. 2004).

In addition, there is no conflict in the circuits regarding the Fifth Circuit's application of *Heck* to an excessive force claim when Plaintiff claims he has been attacked for no reason at all. *Arnold v. Town of Slaughter,* 100 Fed. Appx. 321, at * 3 (5th Cir. 2004); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 657 (5th Cir. 2007).

The other Rule 10 criteria are also absent. Plaintiff asserts erroneous factual findings and/or misapplication of rules of law, circumstances under which a petition for writ of certiorari is rarely granted. Sup. Ct. Rule 10. The Louisiana Supreme Court did not decide an important federal question, let alone decide it in a way that conflicts with the rulings of the high court of any other state or any United States court of appeals. There is no important question of federal law for this Court to settle. The Rule 10 criteria have not been established here.

ARGUMENT

I. Summary of Argument

The Fifth Circuit correctly affirmed the summary judgment dismissing with prejudice the excessive force and malicious prosecution claims brought against Russ Munsell, David Hooter, and Rodney Walker "until *Heck* conditions are satisfied" for the reasons discussed below:

A. The *Heck* Doctrine Was Not Waived

The lower courts correctly found the *Heck* bar to suit is not waived if omitted from an answer and can be raised by motion at trial. *Watson v. New Orleans City*, 275 F.3d 46, 2001 WL 1268716, at *3 (5th Cir. Oct. 16, 2001) (*Heck* doctrine not waived if not plead as an affirmative defense and instead raised in motion for judgment as a matter of law). Even if *Heck* were found to be an affirmative defense, (which is denied), as long as an affirmative defense is "raised in the trial court in a manner that does not result in unfair surprise . . . technical failure to comply precisely with Rule 8(c) is not fatal" and in such a situation a court may hold that the defense was not waived. *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855-856 (5th Cir. 1983); *United States v. Shanbaum*, 10 F.3d 305, 312 (5th

Cir. 1994). Plaintiff does not argue that he was prejudiced by Defendants' not raising *Heck* in their answer. Therefore, the lower courts did not err in finding *Heck* was properly raised by motion and not waived, especially since "waivers of defenses based on grounds rooted in considerations of state sovereignty are applied less harshly than other waivers." *See Graham v. Johnson*, 94 F.3d 958, 970 (5th Cir. 1996) (*per curiam*).

B. *Heck* Applies to Excessive Force Claims Where Plaintiff Categorically Denies Resistance

Plaintiff's excessive force claim which is based solely on his assertion that he did not resist arrest and did nothing wrong "squarely challenges the factual determination that underlies his conviction for resisting an officer" and was properly dismissed by the lower courts. *Arnold v. Town of Slaughter*, 100 Fed. Appx. 321, 324 (5th Cir. 2004). This particular type of excessive force claim falls within the category of excessive force claims that are barred by the Fifth Circuit. *Id.*; *see also DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656-57 (5th Cir. 2007).

C. The Plain Language of *Heck* Applies to Plaintiff Even Though He Is Habeas Ineligible

The lower courts properly dismissed with prejudice Plaintiff's excessive force and malicious prosecution claims pursuant to the plain language of *Heck*. Even though Plaintiff was not in custody when he filed his § 1983 action, *Heck's* favorable termination requirement applies to Plaintiff because he has other procedural means of establishing favorable termination. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000). The mere unavailability of the federal writ of habeas corpus does not affect *Heck's* applicability as long as, like in this case, Plaintiff has other remedies available to call into question his sentence. *Battle v. Marquardt*, No. CV. A. 03-1062, 2006 WL 1073068, at *2 (W.D. Pa. Apr. 21, 2006). Therefore this case is not the appropriate case to decide the split in the circuits regarding whether *Heck* applies to a habeas ineligible plaintiff.

D. The District Court Properly Exercised its Discretion in Denying Rule 54(b) Certification

The Fifth Circuit properly found the district court did not abuse its direction in refusing to certify under Fed. R. Civ. P. 54(b) the dismissal of Plaintiff's excessive force claim. Rule 54(b) certification is warranted only upon the district court's "express determination that there is no just reason for delay

and upon an express direction for entry of judgment." Fed. R. Civ. P. 54(b). Here the inconvenience of piecemeal appeals far outweighed the possibility of delaying Plaintiff's appeal of the district court's dismissal of his excessive force claim. Therefore, the Fifth Circuit properly affirmed the district court's exercise of discretion.

II. The Fifth Circuit Properly Found Summary Judgment Was Warranted

A. *Heck v. Humphrey* Standard

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the majority of the Supreme Court held a § 1983 claim that would impugn a state conviction or sentence "is not cognizable" until the conviction or sentence has been invalidated:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus . . . .

Heck, 512 U.S. at 486-87. This requirement has become known as the "favorable termination" requirement. *Sappington v. Bartree,* 195 F.3d 234, 235 (5th Cir. 1999). Justice Scalia, joined by four other Justices, grounded his opinion on a comparison to the common law, rather than the need to preserve habeas corpus as the exclusive federal remedy. The Court analogized plaintiff's damages action and similar actions that challenge the lawfulness of a conviction or confinement, to common law tort actions for malicious prosecution. Since a successful malicious prosecution claim requires the accused to first obtain a favorable judgment in the criminal prosecution, the Court concluded the same "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 486.

B. The Fifth Circuit Properly Found the *Heck* Doctrine Was Not Waived

Plaintiff cites the residual clause of Fed. R. Civ. P. 8(c) in contending that the Defendants waived the *Heck* bar to suit. Rule 8(c) requires a party to "set forth affirmatively . . . . res judicata, ... and any other matter constituting an avoidance or affirmative defense." Fed. Rule Civ. P. 8(c). However, as recognized by the district court, the residual clause of Rule 8(c) has not been extended to

explicitly cover the *Heck* doctrine. *Quintana v. Gates*, No. CV 0007166 GAF, 2004 WL 1661540, at * 4 (C.D. Cal. July 20, 2004). Agreeing that *Heck* is more akin to a jurisdictional barrier that can be raised by a motion pursuant to Rule 12(b), the district court properly overruled Plaintiff's objection to the use of the *Heck* doctrine. *Quintana*, 2004 WL 1661540, at * 5.

Even if *Heck's* bar to suit is an affirmative defense (which is denied), the lower courts properly found the Defendants did not waive *Heck* by not raising it in their answer. *Watson v. New Orleans City*, No. 00-30438, 275 F.3d 46, 2001 WL 1268716 *3 (5th Cir. Oct. 16, 2001) (*Heck* bar to suit not waived if not plead as an affirmative defense and instead raised in motion for judgment as a matter of law). "The waiver rule is not applied automatically and as a practical matter there are numerous exceptions to it. [One is that] the substance of many unpleaded affirmative defenses may be asserted by pretrial motions, particularly in the absence of prejudice." Charles Alan Wright & Arthur R. Miller, 5 *Federal Practice and Procedure* § 1278 at 491-94 (3d ed. 1990); *accord Phyfer v. San Gabriel Dev. Corp.*, 884 F.2d 235, 241 (5th Cir. 1989).

Where an affirmative defense "is raised in the trial court in a manner that does not result in unfair surprise; however, technical failure to comply precisely with Rule 8(c) is not fatal." *Jones v. Miles*, 656 F.2d 103, 107 n. 7 (5th Cir. 1981). There was no

surprise here and Plaintiff was not prejudiced in his ability to respond. Although Defendants did not raise *Heck* in their answer on January 9, 2007, the *Heck* doctrine was raised at a pragmatically sufficient time when Defendants included *Heck* in their motion to dismiss without prejudice and alternative motion to stay proceeding pending resolution of criminal proceeding filed on May 25, 2007. Defendants did not "lie behind the log." *See Bettes v. Stonewall Ins. Co.*, 480 F.2d 92, 94 (5th Cir. 1973). Thus construing the Federal Rule of Civil Procedure to do substantial justice, the lower courts properly found the *Heck* defense was not waived.

C. The Fifth Circuit Correctly Found *Heck* Bars This Particular Excessive Force Claim Wherein Plaintiff Categorically Denies Resisting Arrest in His § 1983 Action

The lower courts properly found *Heck*, 512 U.S. at 486-87, applied to Plaintiff's particular excessive force claim where Plaintiff alleged he did nothing wrong but was viciously attacked for no reason. *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003) (As "master of his ground," if a plaintiff makes allegations that are inconsistent with his valid convictions, " *Heck* kicks in and bars his civil suit."). The Fifth Circuit in *Arnold v. Town of Slaughter*, 100 Fed. Appx. 321 (5th Cir. 2004), found that in those cases wherein the plaintiff categorically denies resisting arrest, the plaintiff's suit cannot

survive *Heck's* bar because the suit "squarely challenges the factual determination that underlies his conviction for resisting an officer." *Id.* at 324-325.

1. *Arnold* and Its Progeny

In *Arnold,* plaintiff claimed he did nothing to provoke the officer's actions, never attempted to strike the officers, never threatened any of them, or resisted their attempts to arrest him. *Arnold,* 100 Fed. Appx. at 324. However in the criminal case, the trial judge had made a specific finding that plaintiff had resisted the officer by being hostile and threatening and by initiating the confrontation. *Id.* at 324. The court found plaintiff's challenge "distinguishable from excessive force claims that survive *Heck's* bar." *Id.* at 324. The court found this distinction because:

> Arnold's claims are not that police used excessive force after he stopped resisting arrest or even that officers used excessive and unreasonable force to stop his resistance. Instead, Arnold claims that he did nothing wrong, but was viciously attacked for no reason. In this way, Arnold's claims are distinguishable from excessive force claims that survive *Heck's* bar. Arnold's suit squarely challenges the factual determination that underlies his conviction for resisting an officer. If Arnold prevails, he will have

> established that his criminal conviction lacks any basis.

Id. at 324. Following *Arnold,* in *DeLeon v. City of Corpus Christi,* the court found *Heck* barred plaintiff's excessive force claim that was not separable from his aggravated assault conviction because the complaint presented the excessive force claim as single violent encounter throughout which the plaintiff was wholly innocent. *DeLeon,* 488 F.3d 649, 656-57 (5th Cir. 2007); *see also Johnson v. Dallas City Police Dept.,* 2004 WL 2964968 (N.D. Tex. Dec. 15, 2004), *aff'd,* 2005 WL 119467 (N.D. Tex. Jan. 18, 2005) (plaintiff's excessive force claim in which he alleged he did nothing wrong, but was viciously attacked for no reason while in handcuffs was barred by *Heck* because the facts if proved would squarely challenge the factual determinations of his conviction for aggravated assault); *Okoro,* 324 F.3d 488, 490 (7th Cir. 2003) (*Heck* barred plaintiff's claim that police officers stole gems and cash from plaintiff in the course of an arrest on drug trafficking charges where plaintiff "adhered steadfastly to his position" that he was innocent of any wrongdoing); *Beverly v. Talsma,* No. 3:06-CV-0160-DFH-WGH, 2008 WL 2114886, at * 5 (S.D. Ind. Mar. 28, 2008) (summary judgment granted dismissing plaintiff's claims as barred by *Heck* where plaintiff alleged he "was in no way, shape, or form, a threat" to the officer).

2. Plaintiff's Claims are Like *Arnold* and Its Progeny

Plaintiff here claims that he did nothing wrong, did not resist and was viciously attacked for no good reason.

However, Plaintiff was convicted of three (3) counts of resisting an officer under Section 66-293 of the Denham Springs Code and one count of failure to use a turning signal.[13] [14] The judge in the criminal

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[13] City Court of Denham Springs Court Minutes, *City of Denham Springs v. Walker*, No. 221366 (July 13, 2007).

[14] Code of Ordinances, City of Denham Springs (La.) § 66-293 (1987) which mirrors La. R.S 14:108, defines resisting an officer to encompass:

> (a) Resisting an officer is the intentional inference with, opposition or resistance to, or obstruction of an individual action in his official capacity and authorized by law to make a lawful arrest or seizure of property to serve any lawful process of court order when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity. [Emphasis added].

The phrase 'obstruction of' as used in this section shall, in addition to its common meaning, signification, and the connotation mean the following:

(1) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(2) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

court found the Plaintiff resisted the officer:(1) "when he initially ran"; (2) when he was captured, he continued to actively resist"; and (3) when he resisted as "Corporal Walker attempted to cuff him."[15]

Despite the state court's findings, in his sworn deposition and trial testimony Plaintiff maintains that he remembers doing nothing wrong and that the officers just attacked him.[16] Plaintiff's denial of excessive force was the same argument the court found distinguished Arnold's excessive force claim from those that survive *Heck's* bar.

Under La. R.S. 14:108, resisting an officer is defined as:

> Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest, lawful detention, or seizure of property or to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, detaining, seizing property, or serving process is acting in his official capacity. [Emphasis added].

[15] Certified Transcript at 16, *City of Denham Springs v. Walker*, No. 221366, (July 30 2007).

[16] *See supra* text accompanying notes 4-7.

3. Plaintiff's Excessive Force Claim is Distinguishable From Claims That Survive *Heck's* Bar

Plaintiff's excessive force claim is distinguishable from excessive force claims that survive *Heck's* bar. His claim differs from *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007), which involved allegations of excessive force occurring **after** the plaintiff had been placed in lawful custody for resisting arrest. Plaintiff's excessive force claim is also distinguishable from *VanGilder v. Baker*, 435 F.3d 689, 691 (7th Cir. 2006), where *Heck* did not bar a claim of excessive force where plaintiff did not deny his resistance or challenge the factual basis for the conviction.

As Plaintiff's cases illustrate, a § 1983 claim would not necessarily imply the invalidity of a resisting arrest conviction, and therefore would not be barred by *Heck*, if the factual basis for the conviction is temporally and conceptually distinct from the excessive force claim. However, Plaintiff's complaint does not allege that his excessive force claim is separable from the events underlying his resisting arrest conviction. In contrast, Plaintiff's suit squarely challenges the state court judge's factual determinations upon which his conviction of resisting an officer is based. If Plaintiff prevails, he will have established that his criminal conviction lacks any basis. Therefore, the lower court properly

found this lawsuit challenges the validity of Plaintiff's conviction and is barred by *Heck*.

This case is also distinguishable from cases that find an excessive force claim would not necessarily imply the invalidity of a resisting arrest conviction where lawfulness of the arrest is not an essential element of the crime. *See Robinson v. Doe*, 272 F.3d 921, 923 (7th Cir. 2001) (Robinson's excessive force claim was not barred by *Heck* because, under Illinois law, "[p]olice might well use excessive force in effecting a perfectly lawful arrest"); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125 (10th Cir. 1999) (Martinez was allowed to proceed with a § 1983 claim under New Mexico law "to the extent . . . . [it] d[id] not challenge the lawfulness of his arrest"); *Nelson v. Jashurek*, 109 F.3d 142, 145 (3d Cir. 1997) (Nelson was allowed to proceed on a § 1983 claim, despite having an outstanding conviction for resisting Jashureck's arrest, because in Pennsylvania "a finding that Jashurek used excessive 'substantial force' would not imply that the arrest was unlawful . . . ."); *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 537 U.S. 801 (2002) (same).

Under Louisiana law, a conviction for resisting arrest is incompatible with an allegation that the arrest was unlawful. An essential element of the crime of resisting arrest is a lawful arrest. Code of Ordinances, City of Denham Springs (La.)

66-293 (1987)[17]; *see also Arnold,* 100 Fed. Appx. at 325. Moreover, an officer making a lawful arrest, "may use reasonable force to arrest and detain a person and to overcome any resistance or threatened resistance of the person being arrested or detained." La. Code Crim. Proc. Ann. art. 220 (2008). This aspect of Louisiana's law distinguishes the instant case from those regarded by the Plaintiff as conflicting with the decisions of lower courts.

D. The Fifth Circuit Properly Found the Plain Language of *Heck* Applies to Plaintiff Even Though He Is Habeas Ineligible Since Plaintiff Has Other Procedural Means of Establishing Favorable Termination.

The lower court properly found *Heck* precludes Plaintiff's claims even though he is habeas ineligible because as the district court pointed out "there is nothing precluding a direct appeal of the state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck." Walker v. Munsell,* No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007); App. C to Petitioner's Pet. Cert. 22a.

While there may be a split in the circuits regarding whether *Heck* applies to a habeas

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[17] *See supra* note 14.

ineligible plaintiff, resolution of that issue is unnecessary to the outcome of this case because Plaintiff has other procedural means of challenging his conviction. *See Vickers v. Donahue,* 137 Fed. Appx. 285 (11th Cir. 2005) (declining to decide the issue because the plaintiff was not without remedy to seek relief from his sentence of imprisonment, as he could have appealed the order imposing that sentence); *Baker v. City of Hollywood,* No. 08-60294-CIV, 2008 WL 2474665 (S.D. Fla. June 17, 2008) (even though a habeas corpus action was unavailable to the plaintiff, the court did not have to decide whether there was an exception to *Heck* because plaintiff was not without an avenue to seek relief from his conviction).

The plain language of *Heck* provides several means by which a plaintiff may satisfy the favorable termination requirement. The favorable termination requirement may be satisfied by showing that the conviction or sentence has been: (1) reversed on direct appeal; (2) expunged by executive order, (3) declared invalid by a state tribunal authorized to make such determination, (4) or called into question by a federal court's issuance of a writ of habeas corpus. *Heck,* 512 U.S. 477, 486-87. Thus the mere unavailability of the federal writ of habeas corpus (which is merely one of the four methodologies listed in *Heck*) does not affect *Heck's* applicability as long as, like in this case, plaintiff has another state law remedy available to call into question the conviction/sentence. *Battle v. Marquardt,* No. CV. A.

03-1062, 2006 WL 1073068, at *2 (W.D. Pa. April 21, 2006).

In *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000), the Fifth Circuit applied *Heck's* "favorable termination" requirement to a non-custodial plaintiff's § 1983 complaint that challenged his extended sentence because the plaintiff failed to show other "procedural vehicles" were lacking.[18] Likewise in *Hassler v. Carson County*, 111 Fed. Appx. 728, at * 1 (5th Cir. 2004), the court found the *Heck* doctrine applied to a former prisoner who was habeas ineligible because the prisoner failed to show other "procedural vehicle[s]" were lacking. Here as the district court correctly recognized "there is nothing precluding a direct appeal of the state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck*." *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007); App. C to Petitioner's Pet. Cert. 22a.

Plaintiff misconstrues *Heck*, 512 U.S. 477, by disregarding the existence of post-custody state-law

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[18] Recognizing the concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), would relax *Heck's* universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction. The *Randell* court found no need to relax the *Heck* doctrine since Randell had not shown that such a procedural vehicle is lacking; he spoke only of inability to obtain habeas relief. *Id.* at 301.

remedies. Although Justice Souter recognized there are no federal judicial remedies for a person wrongly convicted in state court who is no longer in custody, there are such remedies in state law. The *Heck* majority responded to Justice Souter's concurrence by noting that the favorable termination requirement is "not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 410 n. 10. The *Heck* majority admits that § 1983 will not provide a remedy in all cases. *Id.* Thus, in responding to Justice Souter, the *Heck* majority simply made clear that a released prisoner must demonstrate, by some appropriate means, that his conviction has been invalidated prior to the institution of his § 1983 damages action.

Furthermore, a federal forum is also not required to satisfy the favorable termination requirement. In *Withrow v. Williams*, Justice Scalia attacked the theory that "a federal forum must be afforded for every federal claim of a state criminal defendant." *Withrow*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring). Such a notion is contrary to the very structure of the federal judiciary:

> It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not). And it would be an unworkable constitution that requires redetermination in

> federal courts of all issues of pervasive federal constitutional law that arise in state-court litigation.

Id. at 721. For these reasons the lower courts properly applied *Heck*'s bar to Plaintiff despite his inability to obtain habeas relief.

III. The District Court Did Not Abuse Its Discretion When It Refused To Certify Its Dismissal of Plaintiff's Excessive Force Claim For Immediate Appeal Under Federal Rule Of Civil Procedure 54(b)

The lower courts properly found immediate appeal of the portion of the district court's ruling dismissing plaintiff's excessive force claim did not warrant the use of the court's discretionary power under Fed. R. Civ. P. 54(b) to provide a remedy in the "infrequent harsh case." Notes of the Advisory Committee on Fed. R. Civ. P. 54 concerning 1946 amendments; *Jasmin v. Dumas*, 726 F.2d 242, 244 (5th Cir. 1984).

Rule 54(b) certification is warranted only upon the district court's "express determination that there is no just reason for delay and upon an express direction for entry of judgment." Fed. R. Civ. P. 54(b). The court weighs "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Road Sprinkler Fitters Local Union v. Continental*

Sprinkler Co., 967 F.2d 145, 148 (5th Cir. 1992) quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). This analysis also considers whether the claims under review are separable from those that were not decided by the district court and whether the nature of claims decided are such that the same issues will not have to be decided again in the event of a subsequent appeal. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980).

In this case the inconvenience of piecemeal appeals far outweighed the possibility of delaying Plaintiff's appeal of the district court's dismissal of his excessive force claim. Immediate appeal of Plaintiff's excessive force claim would have been an inefficient use of judicial sources and required Defendants to incur unnecessary duplicative expenses. Thus, the district court's denial of Plaintiff's motion to certify was within the court's discretion under Fed. R. Civ. P. 54(b), and the Fifth Circuit correctly affirmed that decision.

In addition, any argument that the district court erred by dismissing the excessive force claim with prejudice "until *Heck* conditions are satisfied" is unavailing because Plaintiff has failed to show his conviction has been invalidated or called into question. *See Heck v. Humphrey*, 512 U.S. 477 (1994); *Boyd v. Biggers*, 31 F.3d 279, 283 (5th Cir. 1994); *Stephenson v. Reno*, 28 F.3d 26, 27 (5th Cir.1994); *Johnson v. McElveen*, 101 F.3d 423 (5th

Cir. 1996); *DeLeon v. City of Corpus Christi*, 488 F.3d 649 (5th Cir. 2007). In *Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir.1994), the court squarely held that it was not error to dismiss a complaint pursuant to *Heck* with prejudice. A plaintiff's claim is dismissed with prejudice under *Heck* because he has not satisfied the *Heck* requirements and he has no cause of action on his damage claims. *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996).

Additionally, the Supreme Court's recent decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), has no effect on the district court's dismissal of this case. In *Wallace*, the Court made clear that *Heck* does not bar "an action which would impugn an anticipated future conviction . . . ." *Id.* at 1097 [Emphasis added]. In fact the *Wallace* Court specifically held: "If the plaintiff is ultimately convicted, and if the civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit." *Wallace*, 127 S. Ct. at 1098. Since Plaintiff has been convicted, and his conviction squarely challenges his conviction the lower courts correctly dismissed Plaintiff's claims as barred by *Heck*. *Heck*, 512 U.S. 477 (1994).[19]

CONCLUSION

The district court's judgment dismissing Petitioner's excessive force and malicious prosecution claims were properly affirmed by the Fifth Circuit. Additionally, the Fifth Circuit correctly found that the district court did not abuse its discretion in declining to certify its dismissal of Petitioner's excessive force claim for immediate appeal under Federal Rule of Civil Procedure 54(b).

Because the Petitioner fails to show compelling reasons for this Court's review of the Fifth Circuit's ruling, the Petitioner's writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A· RULING ON MOTION FOR RULE 54(B) CERTIFICATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED NOVEMBER 13, 2007

United States District Court, M.D. Louisiana.

Clayton Anthony WALKER, et al.
v.
Officer Russ MUNSELL, et al.
Civil Action No. 06-867-JJB-SCR.

Nov. 13, 2007.

Donna Unkel Grodner, Charlotte McDaniel McGehee, Grodner and Associates, APLC, Baton Rouge, LA, for Plaintiffs.
Bradley C. Myers, Katie L. Deranger, Lana Davis Crump, Kean, Miller, Hawthorne, D'Armond, Baton Rouge, LA, for Defendants.

RULING ON MOTION FOR RULE 54(b) CERTIFICATION

JAMES J. BRADY, District Judge.
*1 Before the court is a motion by plaintiff for certification (doc. 82) under Fed. Rule Civ. P. 54(b). The motion is opposed (doc. 85). There is no need for oral argument.

When multiple claims and parties are involved, the court "may direct the entry of judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."Fed. Rule Civ. P. 54(b). While application of the rule is discretionary, there is "an historic federal policy against piecemeal appeals."*H & W Industries, Inc. v. Formosa Plastics Corp., USA,* 860 F.2d 172, 175 (5th Cir.1988). For that reason, district courts have been instructed to use the procedure sparingly rather than routinely. *Jasmin v. Dumas,* 726 F.2d 242, 244 (5th Cir.1984).

In this case, plaintiff has failed to demonstrated that certification under Rule 54(b) would be appropriate.

Accordingly, the motion for certification under Rule 54(b) (doc. 82) is hereby DENIED.

M.D.La.,2007.
Walker v. Munsell
Slip Copy, 2007 WL 3377270 (M.D. La.)

APPENDIX B- 42 U.S.C. § 1983

Petitioner's claims for violation of his constitutional rights is brought pursuant to 42 U.S.C. § 1983. Section 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C- U.S. CONST. AMENDMENTS IV AND XIV

The claims of the Petitioner which were dismissed on Respondents' motion for summary judgment were for alleged violations of the Fourth and Fourteenth Amendments to the United States Constitution. The relevant constitutional amendments are as follows:

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; appointment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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